

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVEN PRESCOTT and LINDA CHESLOW,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

NESTLE USA, INC.,

Defendant.

Case No. 19-cv-07471-BLF

**CORRECTED¹ ORDER GRANTING
MOTION TO STAY; TERMINATING
WITHOUT PREJUDICE MOTION TO
DISMISS SECOND AMENDED
COMPLAINT; VACATING
DECEMBER 17, 2020 HEARING; AND
ADMINISTRATIVELY CLOSING
CASE**

[Re: ECF 55, 56]

This order addresses two motions that have been noticed for hearing on December 17, 2020: (1) a motion to dismiss the second amended complaint filed by Defendant Nestle USA, Inc., and (2) a motion to stay the case filed by Plaintiffs Steven Prescott and Linda Cheslow.

Pursuant to Civ. L.R. 7-1(b), the Court finds the stay motion suitable for decision without oral argument, and it GRANTS a stay for the reasons discussed below. In light of the stay, the Court TERMINATES WITHOUT PREJUDICE Nestlé's motion to dismiss. The December 17, 2020 hearing is VACATED.

I. BACKGROUND

Plaintiffs filed this putative class action against Nestlé in the Santa Cruz County Superior Court on September 19, 2019, alleging that Nestlé violates state consumer protection statutes in marketing its "Nestlé's Toll House's Premier White Morsels." *See* Compl., ECF 1-1. Specifically, Plaintiffs claim that Nestlé "sells fake white chocolate baking chips and tries to market them as white chocolate" and that Nestlé's profits are "attributable, in part, to deceptive

¹ This Corrected Order is issued to correct a clerical error at page 8, line 19 of the Order issued November 23, 2020, where the Court directed the parties to submit a joint status report by November 22, 2020 rather than by November 22, 2021, as was intended.

1 labeling and advertising of the Product as containing white chocolate” when “[i]n reality, the
 2 Product does not contain *any* white chocolate.” Compl. ¶¶ 1, 3. The complaint asserted claims
 3 under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.*;
 4 California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*, and
 5 California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.* See
 6 Compl., ECF 1-1. Nestlé removed the case to federal court on November 13, 2019. See Notice of
 7 Removal, ECF 1. Plaintiffs have amended their claims once as of right and once following this
 8 Court’s dismissal of their first amended complaint (“FAC”) with leave to amend. See FAC, ECF
 9 13; SAC, ECF 54.

10 In its order dismissing the FAC, the Court noted that Cheslow and Prescott are the named
 11 plaintiffs in another putative class action in this district, *Cheslow v. Ghirardelli Chocolate Co.*,
 12 No. 19-cv-07467, in which they claim that Ghirardelli deceives consumers into believing that its
 13 “Premium Baking Chips Classic White Chips” product contains white chocolate when it does not.
 14 See Order Granting Motion to Dismiss at 4-5, ECF 49. The complaint in *Ghirardelli* had been
 15 dismissed with leave to amend based in part on the district court’s conclusion that use of the words
 16 “white” and “premium” in the labeling would not deceive a reasonable consumer into believing
 17 that Ghirardelli’s baking chips contain white chocolate. See *Cheslow v. Ghirardelli Chocolate Co.*
 18 (“*Ghirardelli I*”), 445 F. Supp. 3d 8, 17 (N.D. Cal. 2020). This Court found *Ghirardelli I* “highly
 19 persuasive” and relied on it in concluding that no reasonable consumer would believe that Nestlé’s
 20 baking chips contain white chocolate simply because the words “white” and premier” are used in
 21 the labeling. Order Granting Motion to Dismiss at 5-8, ECF 49. This Court dismissed the FAC
 22 against Nestlé with leave to amend. See *id.* at 10.

23 Meanwhile, the *Ghirardelli* court issued an order dismissing the amended complaint with
 24 prejudice. See *Cheslow v. Ghirardelli Chocolate Co.* (“*Ghirardelli II*”), No. 19-CV-07467-PJH,
 25 2020 WL 4039365, at *1 (N.D. Cal. July 17, 2020). Plaintiffs had added new allegations showing
 26 that 92% of consumers surveyed believed the Ghirardelli product contains white chocolate. See
 27 *Ghirardelli II*, 2020 WL 4039365, at *6. The district court held that the survey could not
 28 transform inadequate claims into adequate ones. See *id.* In addition, the court noted that the

1 survey respondents were not shown the back of the product package and thus were not able to see
2 the ingredient list. *See id.* The *Ghirardelli* court opined that “where the defendant does not
3 commit a deceptive act, the reasonable consumer cannot entirely disregard the ingredient list,” and
4 that “[b]ecause the survey does not address the ingredient list (by omitting the back panel), it
5 cannot transform plaintiffs’ unreasonable understanding concerning white chips into a reasonable
6 one.” *Id.*

7 A few days after *Ghirardelli II* issued, Plaintiffs filed their operative second amended
8 complaint (“SAC”) in the present action. *See* SAC, ECF 54. Plaintiffs have added new
9 allegations showing that 95% of consumers surveyed believed the Nestlé product contains white
10 chocolate. *See* SAC ¶¶ 10, 86. Nestlé has filed a motion to dismiss the SAC that relies heavily on
11 the final dismissal order in the parallel *Ghirardelli* case. *See* Mot. to Dismiss, ECF 55. Indeed,
12 Nestlé has cited to *Ghirardelli* more than twenty times in its twelve-page motion to dismiss the
13 SAC in the present action, arguing that this Court should follow the *Ghirardelli* court’s reasoning
14 and dismiss the present action with prejudice. *See id.*

15 Plaintiffs have filed an opposition to Nestlé’s motion to dismiss and a motion to stay the
16 present case pending disposition of their Rule 59(e) motion and appeal in *Ghirardelli*. *See* Opp. to
17 Mot. to Dismiss, ECF 57; Mot. to Stay, ECF 56. The Rule 59(e) motion since has been denied
18 and the *Ghirardelli* appeal is proceeding. *See* Order Denying Rule 59(e) Motion in Case No. 19-
19 cv-07467, ECF 64; Plaintiffs-Appellants’ Response in Case No. 20-16576, Dkt. Entry 7. Plaintiffs
20 contend that they are likely to prevail on their appeal of the *Ghirardelli* judgment in light of the
21 Ninth Circuit’s recent decision in *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007 (9th Cir. 2020),
22 which was issued after entry of judgment in *Ghirardelli*.

23 Both the motion to dismiss and the motion to stay are fully briefed and set for hearing on
24 December 17, 2020. Plaintiffs ask the Court to stay consideration of the motion to dismiss, and all
25 litigation in this case, pending disposition of the *Ghirardelli* appeal. Nestlé contends that
26 Plaintiffs have not established an adequate basis for a stay and it urges the Court to proceed with a
27 determination on the merits of the motion to dismiss.
28

II. LEGAL STANDARD

District courts have the “discretionary power to stay proceedings.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v. No. American Co.*, 299 U.S. 248, 254 (1936)). This power is “incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254. The court may “find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 863–864 (9th Cir. 1979)). “This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.” *Leyva*, 593 F.2d at 863–64.

In determining whether to grant a stay, “the competing interests which will be affected by the granting or refusal to grant a stay must be weighed.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254–55). “Among these competing interests are [1] the possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *Id.*; see also *Gustavson v. Mars, Inc.*, Case No. 13-cv-04537-LHK, 2014 WL 6986421, at *2 (N.D. Cal. Dec. 10, 2014). In addition, the “proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255). If there is “even a fair possibility” of harm to the opposing party, the moving party “must make out a clear case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 255.

III. DISCUSSION

Plaintiffs argue that a stay is warranted under this standard, because there is no possibility of damage to Nestlé, Plaintiffs will suffer hardship if required to continue this litigation absent a stay, and a stay will promote judicial economy. In response, Nestlé argues that it will suffer

1 damage from a stay, as Plaintiffs' appeal in the *Ghirardelli* case lacks merit and a stay would last
2 an unforeseeable and likely protracted amount of time.

3 For the reasons discussed below, the Court will exercise its broad discretion to manage its
4 docket and grant a one-year stay. If the Ninth Circuit has not provided guidance in *Ghirardelli* by
5 the time the stay expires, Plaintiffs may request an extension.

6 **A. Damage to Nestlé if Stay is Granted**

7 Plaintiffs argue that Nestlé must prove it will suffer damage if the Court grants the stay.
8 Nestlé argues that Plaintiffs have the burden to show that the relevant factors favor a stay, and that
9 it does not have any burden to prove it will suffer damage if a stay is issued. The Court agrees
10 with Nestlé that Plaintiffs, as the moving parties, bear the burden of showing that the relevant
11 factors favor a stay. *See Clinton*, 520 U.S. at 708 ("The proponent of a stay bears the burden of
12 establishing its need.").

13 It is undisputed that resolution of the case will be delayed if a stay is granted. Nestlé
14 points out that the median time for the Ninth Circuit to resolve non-prisoner civil appeals on the
15 merits is 15.9 months. *See Opp. to Mot. to Stay* at 2-3 & n.1, ECF 60. Plaintiffs do not challenge
16 that timeline. However, Plaintiffs point out that other district courts have granted a stay where, as
17 here, the nonmoving party has not articulated any concrete prejudice flowing from delay. *See*
18 *H.M. v. United States*, No. CV 17-00786 SJO, 2017 WL 6888705, at *3 (C.D. Cal. Oct. 16, 2017)
19 ("While Plaintiffs assert that a stay is premature and that there is a possibility of prejudice caused
20 by any undue delay in the litigation, they provide no concrete examples of potential harm.").
21 Plaintiffs also argue that a stay actually will result in conservation of Nestlé's resources. Nestlé
22 relies heavily on *Ghirardelli* in seeking dismissal of the present action with prejudice. Resolution
23 of Plaintiffs' appellate challenges to the *Ghirardelli* rulings potentially will resolve, and certainly
24 will clarify, issues central to disposition of the present action.

25 On balance, the Court finds that this factor weighs in favor of a stay. The record does not
26 disclose any concrete prejudice to Nestlé if the present action is stayed. To the extent Nestlé
27 simply wants this case off its books, the Court notes that Plaintiffs almost certainly would appeal a
28 dismissal with prejudice, and that appeal would take fifteen-plus months to resolve. Moreover, the

1 Court will address Nestlé's concern about a stay of indeterminate length by limiting the stay to a
 2 period of one year, and requiring Plaintiffs to seek an extension if the Ninth Circuit has not yet
 3 issued its decision on the *Ghirardelli* appeal.

4 **B. Hardship to Plaintiffs if Required to Go Forward**

5 Plaintiffs argue that they will face hardship if the Court denies the motion to stay because
 6 the Court likely will be influenced by the *Ghirardelli II* dismissal order, which Plaintiffs contend
 7 is likely to be overturned on appeal. Plaintiffs assert that *Ghirardelli II*, which emphasized the
 8 significance of the Ghirardelli product's back label ingredient list, is undermined by the Ninth
 9 Circuit's recent decision in *Moore*. In *Moore*, the Ninth Circuit discussed the impact of the
 10 ingredient list on false labeling claims, and it made clear that a labeling claim is not defeated
 11 where a back label ingredient list conflicts with a front label claim. *Moore*, 966 F.3d at 1017.
 12 Since this Court relied on *Ghirardelli I* when granting Nestlé's prior motion to dismiss, Plaintiffs
 13 maintain that Nestlé is "banking on the fact" that this Court will rely on *Ghirardelli II* when
 14 evaluating Nestlé's current motion to dismiss.

15 Nestlé argues that *Ghirardelli II* was correctly decided and is not undermined by *Moore*,
 16 and that in any event Plaintiffs can and should argue the asserted infirmities of *Ghirardelli II* in
 17 the context of the pending motion to dismiss. In Nestlé's view, Plaintiffs know that the pending
 18 motion to dismiss is meritorious and they are simply trying to delay another unfavorable ruling.

19 The Court finds that under the somewhat unique circumstances presented here, Plaintiffs
 20 would suffer hardship absent a stay. The *Ghirardelli* case and the present case involve nearly
 21 identical issues. Nestlé expressly relies on *Ghirardelli II* in its pending motion to dismiss, citing
 22 *Ghirardelli* more than twenty times in its twelve-page motion and asking this Court to follow the
 23 *Ghirardelli* court's reasoning. Given the way Nestlé has framed the issues in the present case,
 24 proceeding with the present litigation would require Plaintiffs to expend needless resources when
 25 a stay would allow them to wait for definitive guidance. Other courts in this district have found a
 26 stay appropriate in similar circumstances. *See Gustavson*, 2014 WL 6986421, at *3 (granting stay
 27 where the Ninth Circuit was expected to issue guidance on relevant issues in separate action).
 28 Accordingly, this factor weighs in favor of a stay.

1 **C. The Orderly Course of Justice**

2 Plaintiffs argue that a stay would simplify the present case, as the *Ghirardelli* appeal will
3 resolve central issues such as the impact of the alleged consumer survey and the effect of
4 Plaintiffs’ failure to show survey respondents the back label ingredient list. Other district courts in
5 the Ninth Circuit have granted stays where doing so would simplify issues and serve judicial
6 economy. For example, in *L.A. Printex*, the district court granted a stay pending disposition of a
7 state court action where the “key issue in dispute” was the same between the federal and state
8 actions. *L.A. Printex Indus., Inc. v. Did Fabric, Inc.*, No. CV 15-2351-R, 2015 WL 12696174, at
9 *2 (C.D. Cal. Nov. 17, 2015).

10 Nestlé argues that neither the *Ghirardelli* appeal nor the present case present thorny issues
11 that would warrant a stay. Nestlé also argues that stays pending appeal of a separate action are
12 disfavored in the Ninth Circuit. *See Perron v. Hewlett-Packard Co.*, No. 10-CV-00695-LHK,
13 2011 WL 1344221, at *2 (N.D. Cal. Apr. 8, 2011) (“[D]istrict courts frequently deny requests for
14 a stay pending appeal of a separate, but related, action.”); *ASUSTek Computer Inc. v. Ricoh Co.*,
15 No. C0701942 MHP, 2007 WL 4190689, at *3 (N.D. Cal. Nov. 21, 2007) [T]he Ninth Circuit has
16 acknowledged that a stay pending appeal is of dubious character and may result in indefinite
17 delay.”).

18 The decisions cited by Nestlé are factually distinguishable from the present case. In
19 *Perron*, the plaintiffs moved to stay a class action pending appeal of a separate class action
20 settlement that extinguished the plaintiffs’ claims in the case in which a stay was sought. *See*
21 *Perron*, 2011 WL 1344221, at *1. The district court determined that the plaintiffs had failed to
22 establish prejudice in the absence of a stay, a stay would do little to conserve judicial resources,
23 and a stay might run afoul of the class action settlement. *See id.* at 2-3. In *ASUSTek*, the district
24 found that there was minimal risk of duplication based on the pending appeal and that staying the
25 litigation would prejudice the nonmoving party by requiring it to continue living in the shadow of
26 threatened patent litigation. *See ASUSTek*, 2007 WL 4190689, at *3. Here, Plaintiffs have shown
27 that the *Ghirardelli* appeal involves several key issues in the present case and that a stay would not
28 impose any concrete prejudice on Nestlé.

The Court notes that Nestlé has taken pains to show that *CMAX*, *Landis*, *Leyva*, and *Dependable Highway* are factually distinguishable from the present case. As Plaintiffs point out, those cases were cited for the applicable legal standard and not to show factual similarity to the present case. Having applied that legal standard here, this Court finds that judicial economy will be served by staying the present case to await guidance from the Ninth Circuit on identical issues in a nearly identical case. “Considerations of judicial economy are highly relevant in determining whether the orderly course of justice weighs in favor of a stay.” *Calvillo Manriquez v. DeVos*, No. 17-CV-07210-SK, 2018 WL 5316174, at *3 (N.D. Cal. Aug. 30, 2018). Accordingly, this factor favors granting a stay.

D. Conclusion

The Court concludes that all three of the relevant factors favor a stay of this case pending disposition of the appeal in the *Ghirardelli* case. Mindful of Nestlé’s concern regarding an indefinite stay, the Court will limit the stay to one year and require Plaintiffs to seek an extension if the Ninth Circuit has not yet issued a decision in *Ghirardelli*.

IV. ORDER

(1) Plaintiffs’ motion for a stay is GRANTED through November 22, 2021 or resolution of the *Ghirardelli* appeal, whichever occurs first. In the event that the *Ghirardelli* appeal is not resolved by November 22, 2021, Plaintiffs may seek an extension of the stay. The parties shall submit a joint status report on or before November 22, 2021.


(2) Nestlé’s pending motion to dismiss is TERMINATED WITHOUT PREJUDICE to renewal, if appropriate, after the stay is lifted.

(3) The December 17, 2020 hearing date is VACATED.

(4) The Clerk SHALL administratively close this case. This is an internal procedure that does not affect the substantive rights of the Parties. The Parties may request that the case be reopened, if appropriate, upon the lifting of the stay.

(5) This order terminates ECF 55 and 56.

Dated: November 25, 2020


BETH LABSON FREEMAN
United States District Judge